IP 02-0648-C T/K Kennington v Cottey [3]
Magistrate Tim A. Baker Signed on 3/8/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KENNINGTON, JAMES, Plaintiff, vs. CARTER, DAVID OFFICER* DISMISSAL 9/18/03, DAIVS, MIKE OFFICER* DISMISSAL ON 7/11/03, CITY OF LAWRENCE* DISMISSED 9/18/03, COTTEY, JACK SHERIFF MARION COUNTY, UNNAMED OFFICERS (DISMISSED 8/13/02), Defendants.	)	CAUSE NO. IP02-0648-C-T/K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES KENNINGTON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 02-0648-C-T/K
	)	
MARION COUNTY SHERIFF JACK COTTEY, in his official capacity,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION ON PLAINTIFF'S PETITION FOR ATTORNEYS' FEES

I. Introduction.

Plaintiff James Kennington brought suit against various city of Lawrence police officers, alleging violations of his constitutional rights, and against the Marion County Sheriff ("the Sheriff") alleging violations of Title II of the Americans with Disabilities Act ("ADA"). Kennington settled with the Lawrence police officers at an August 12, 2003 settlement conference, but Kennington's ADA claim against the Sheriff trudged forward, culminating in cross motions for summary judgment. On June 28, 2004, the Court ruled that the Sheriff violated the ADA by failing to provide Kennington, who is deaf, with assistive communicative devices and services during Kennington's incarceration. [Docket No. 88, p. 16]. Thereafter, the parties reached a settlement, pursuant to which the Sheriff agreed to pay Kennington $5,000 and reasonable attorneys' fees to be determined by the Court. Kennington's petition for attorneys' fees followed, pursuant to which Kennington sought $61,949.45 in attorneys' fees and $4,565.39 in costs. This motion is now before the Court for resolution.

For the reasons that follow, the Magistrate Judge recommends that Kennington's petition for attorneys' fees be GRANTED in part and DENIED in part, and that Kennington be awarded $51,201.95 in attorneys' fees and $2,511.56 in costs.

II. Standard.

"[A] prevailing party under the ADA is entitled to 'an award of fees for all time reasonably expended in pursuit of the ultimate result achieved.'" Shott v. Rush-Presbyterian-St. Luke's Medical Center, 338 F.3d 736, 739 (7th Cir. 2003), quoting Jaffee v. Redmond, 142 F.3d 409, 416 (7th Cir. 1998), quoting Hensley v. Eckerhart, 461 U.S. 424, 431 (1983). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley, 461 U.S. at 433. This "lodestar" amount may then be reduced or enhanced based on a variety of factors, including:

> the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the "undesirability" of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

Mathur v. Board of Trustees of Southern Illinois University, 317 F.3d 738, 742 n.1 (7th Cir. 2003). Finally, as the fee applicant, Kennington bears the burden "of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Hensley, 461 U.S. at 436.

III. Discussion.

Kennington seeks $66,514.84 in fees and costs as the prevailing party in this matter.[1] The Sheriff does not dispute Kennington's status as a prevailing party, but takes issue with the amount of fees and costs requested by Kennington for a variety of reasons. Briefly, the Sheriff argues that: (1) Kennington's attorneys' hourly rates are excessive; (2) Kennington's degree of success does not warrant recovery of all of his attorneys' fees and costs; (3) the Sheriff is only responsible for fees and costs related to Kennington's ADA claim (as opposed to Kennington's constitutional claims against the Lawrence police officers); (4) not all of the hours charged are for compensable tasks; (5) the amount of time spent on certain tasks is excessive; and (6) Kennington's attorneys' time records lack sufficient specificity. The Court addresses each of these arguments below in turn.

A. Hourly Rate.

The Sheriff first challenges the rates claimed by Kennington's attorneys as unreasonably high. As noted above, the party requesting fees bears the burden of substantiating the reasonableness of the hourly rate and hours expended. McNabola v. Chicago Transit Authority, 10 F.3d 501, 518 (7th Cir. 1993). For purposes of calculating the lodestar, the reasonable hourly rate is based on the market rate for the attorney's work. Id. at 519. The Seventh Circuit Court of Appeals defines the market rate as "the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the kind of work in question." Stark v. PPM

[1]Kennington's petition seeks $58,436.95 in attorneys' fees and $4,565.39 in costs, plus an additional $3,512.50 in attorneys' fees for preparing his reply for the instant motion.

America, Inc., 354 F.3d 666, 674 (7th Cir. 2004). As summarized in Craig v. Christ:

> A wide range of evidence may be relevant in determining a market rate for an attorney's services. Evidence concerning the attorney's experience, expertise, and prior fee awards may all be relevant. The best evidence of a market rate, however, is an actual exchange of money between a willing buyer and a willing seller. Thus, the best evidence of an attorney's market rate for these purposes is evidence showing the rate the attorney actually charges and receives for his or her services on a non-contingent basis.

1999 WL 1059704, at *4 (S.D. Ind. 1999), citing Gusman v. Unisys Corp., 986 F.2d 1146, 1149-51 (7th Cir. 1993); Barrow v. Falck, 977 F.2d 1100, 1105 (7th Cir. 1992). Finally, while not dispositive, an attorney's actual billing rate for comparable work is presumptively appropriate to use as the market rate. Gusman, 986 F.2d at 1150.

1. Michael Sutherlin.

In his fee petition, Kennington seeks $350/hour for his lead counsel, Michael Sutherlin. To establish the reasonableness of this hourly rate, Kennington proffers the affidavit of Sutherlin, Sutherlin's billing records with respect to Kennington's case, and the affidavits of other practicing attorneys within the community, namely Hamid R. Kashani, John David Hoover, and Richard A. Waples. In addition, Kennington submits the Marion Superior Court's decision in Perkins v. Deputy Redford Earles, et al., 49D02-9902-CT-00183, in which Judge Kenneth H. Johnson awarded Sutherlin $350/hour.

Sutherlin's affidavit establishes that he has practiced law since 1974, primarily focusing his practice in civil rights, constitutional, and international law. Sutherlin is well known locally and has appeared frequently before the undersigned. Sutherlin has successfully litigated numerous civil rights cases. Sutherlin states that he currently charges clients $350 per hour for his services. However, when he began charging this rate is somewhat unclear. For example, in his September 29, 2004 affidavit submitted in conjunction with the instant matter, Sutherlin

states, "[a]s lead counsel, I have charged $350/hour since April 2001 and have been paid that rate by many of our hourly clients that have retained our office for advise [sic] and legal services." [Sutherlin Aff., ¶ 13]. In contrast, in a November 22, 2002 affidavit involving a different matter, Sutherlin states that he received "$300.00 an hour from several clients up to March 2002" and that "[s]ince then [he] raised [his] rate to $350.00 an hour. . . ." [Def.'s Ex. C, ¶ 8]. The discrepancy between Sutherlin's sworn statements is eye catching. However, giving Sutherlin the benefit of the doubt, the Court assumes that the difference is most likely attributable to a typographical error in one or both of the affidavits.[2] Ultimately, however, this discrepancy makes no real difference, for as discussed below, Sutherlin's reasonable hourly rate is somewhat lower.

While it is Kennington's burden to substantiate that the hourly rates charged by his attorneys is reasonable, this burden is not onerous. However, Kennington must produce competent evidence that would allow the Court to conclude that paying clients are willing to pay the hourly fee requested by Sutherlin. See Gusman, 986 F.2d at 1150 ("the best measure of the cost of an attorney's time is what that attorney could earn from paying clients. . . . If he were not representing this plaintiff in this case, the lawyer could sell the same time to someone else. That other person's willingness to pay establishes the market's valuation of the attorney's services."). Here, Sutherlin's 2004 affidavit states that he has been paid an hourly rate of $350 "by many of our hourly clients." [Sutherlin Aff., ¶ 13]. Thus, while "[a]n attorney's self-serving

[2]In his evidence in support of the attorneys' fees incurred on reply, the Court notes that Sutherlin's final entry of 2.5 hours was billed at a rate of $35/hour, rather than Sutherlin's requested $350/hour. [Docket No. 115]. The Court assumes this is a typographical error. Errors in billing records and sworn affidavits suggest that top-tier rates may not be appropriate.

affidavit alone cannot satisfy the plaintiff's burden of establishing the market rate for that attorney's services," Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 556 (7th Cir. 1999), even Sutherlin's own affidavit suggests that not all of his paying clients pay $350 per hour. Accordingly, Sutherlin's actual effective market rate is less than $350/hour.

However, Sutherlin's affidavit, by itself, does not allow the Court to determine Sutherlin's actual market rate. For example, the Court has no way of knowing what percentage of Sutherlin's paying clients are willing to pay $350 per hour for his services. "Many" could mean most of Sutherlin's hourly clients, a sparse minority of Sutherlin's hourly clients, or anywhere in between. There is no way to tell. Moreover, there is no evidence of what Sutherlin's "other" hourly clients, i.e. those that are not among the "many," are willing to pay. Accordingly, since the Court is unable to determine what Sutherlin actually charges and receives for his services on a non-contingent basis, it looks elsewhere to determine Sutherlin's market rate. See People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 90 F.3d 1307, 1310 (7th Cir. 1996) ("If the court is unable to determine the attorney's true billing rate, however (because he maintains a contingent fee or public interest practice, for example), then the court should look to the next best evidence -- the rate charged by lawyers in the community of 'reasonably comparable skill, experience, and reputation.'") (citation omitted).

In addition to Sutherlin's affidavit, Kennington also submits the affidavits of attorneys Kashani, Waples, and Hoover[3], all of whom practice in the Southern District of Indiana.

[3]Hoover's affidavit is not particularly helpful. Hoover does not identify his hourly rate or otherwise provide insight on previous awards in similar cases. Instead, Hoover essentially states that based upon Sutherlin's reputation and experience, it is Hoover's opinion that $350 per hour in an appropriate market rate. Hoover's opinion is of marginal value.

According to Kashani's affidavit, his practice "usually" involves contingent fees. [Kashani Aff., ¶ 4]. Likewise, Waples indicates that his practice is split approximately 75% to 25% between contingency and hourly cases. [Waples Aff., ¶ 6]. However, Kashani charges his fee-paying clients $350 per hour [Kashani Aff, ¶ 4], and Waples charges his hourly clients $300 per hour. [Waples Aff., ¶ 7]. While the hourly rates of Kashani and Waples are relevant, they are not conclusive of Sutherlin's market rates. Kashani and Waples both indicate that their respective practices revolve mostly around contingency-driven matters. The Seventh Circuit Court of Appeals has noted the difficulty in determining an attorney's true billing rate when the attorney spends a majority of time on contingency fee cases. See, e.g, People Who Care, 90 F.3d at 1312-13, quoting Gusman, 986 F.2d at 1150-51 (noting that even if an attorney won 80% of his contingency fee cases, his market-clearing price would be less than, and perhaps considerably so, the rate billed to hourly clients). Thus, the Seventh Circuit Court of Appeals does not require a "district court to leap directly from the willingness of some persons to pay $X to Lawyer Y that $X is 'the' hourly rate of Lawyer Y." Id. It is, however, the starting point. Id.

Perhaps more relevant is Kashani's testimony that he has been awarded $250 and $275 per hour in civil rights cases in the United States District Court for the Southern District of Indiana.[4] [Kashani Aff., ¶ 5]. Similarly, Waples stated that in his last two contested fee disputes, he was awarded $275 per hour for 2002 work in the Southern District of Indiana, and $250 per hour for work done between 1996 and 1998 in the Northern District of Indiana. These figures are more in line with Sutherlin's true market rate and the market rate for civil rights

[4]Kashani does not state when he received the awards or for what time periods they covered.

attorneys in Indianapolis with similar ability and experience.[5] Indeed, while Kennington points to several federal decisions where courts have awarded $350 per hour or higher in civil rights cases, none of those cases is from Indiana, or more specifically, the Southern District of Indiana.[6] [Docket No. 114, p. 3]. As noted above, market rate is defined as "the rate that lawyers of similar ability and experience in the community normally charge their paying clients for the kind of work in question." Stark v. PPM America, Inc., 354 F.3d 666, 674 (7th Cir. 2004) (emphasis added). Thus, that lawyers in other legal markets receive higher rates for their services is of little value in the case at hand.

Of course, as the Seventh Circuit Court of Appeals has cautioned that:

> just because the proffered rate is higher than the local rate does not mean that a district court may freely adjust that rate downward. When a local attorney has market rates that are higher than the local average, "[a] judge who departs from this presumptive rate must have some reason other than the ability to identify a different average rate in the community."

Mathur v. Board of Trustees of Southern Illinois University, 317 F.3d 738, 743-44 (7th Cir.

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[5]The Court also notes the recent ADA case of Young v. DiamlerChrysler Corp., 2004 WL 2538640, *2 (S.D. Ind. 2004). In that case, Chief Judge McKinney awarded $275 per hour for work completed in 2004 to a local practitioner with as much, if not more, experience and expertise than Sutherlin.

[6]As noted above, Kennington also submits Perkins v. Deputy Redford Earles, et al., 49D02-9902-CT-00183, as evidence of Sutherlin's $350 hourly rate. The court's award in Perkins is relevant to the Court's consideration of the matter at hand. However, it is not dispositive. "While hourly rates awarded to counsel in similar cases are evidence of an attorney's market rate 'each court should certainly arrive at its own determination as to a proper fee.'" Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 557 (7th Cir. 1999), quoting People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205, 90 F.3d 1307, 1312 (7th Cir. 1996). After reviewing the decision, the Court finds that Perkins is not particularly helpful. While the court ultimately concluded that Sutherlin's market rate was $350 per hour, it provided no discussion or reasoning on how it reached such a conclusion, even in the face of objections filed by the opposing party.

2003), quoting Gusman, 986 F.2d at 1151. "A judge might say, for example, that the lawyers did not display the excellence, or achieve the time savings, implied by their higher rates. A judge might conclude that the plaintiff did not need top-flight counsel in a no-brainer case." Gusman, 986 F.2d at 1151. As discussed above, fee awards in similar cases in this district involving attorneys of comparable skill and experience have resulted in hourly fees ranging from $250 to $275 per hour. However, this is not the only reason to deviate from Sutherlin's requested rate of $350 per hour. Specifically, the Court finds that this was a relatively straightforward case -- both factually and legally. In making this determination, the Court does not suggest that the case was a "no-brainer." However, it was not the type of complex litigation that would justify significantly higher rates than the prevailing market rate for similar cases in the community. As the case history reflects, the Lawrence Defendants settled the claims against them at a settlement conference. The benefit of hindsight suggests that the Sheriff probably should have settled at that time as well, since the Court subsequently granted summary judgment in Kennington's favor. For all of these reasons, the Court will calculate Sutherlin's lodestar amount at $275 per hour.

2. Joseph Merrick.

Kennington seeks the hourly market rate of $200 for Joseph Merrick. The Sheriff claims that Kennington failed to meet his burden in substantiating this rate as reasonable. Specifically, the Sheriff argues that "[n]one of the evidence submitted by Plaintiff substantiates anything regarding similar ability and experience to other lawyers in the community who normally charge their paying clients $200 per hour for civil rights cases. None of the affidavits submitted by Plaintiff address Mr. Merrick." [Docket No. 111, p. 5]. The Court agrees.

According to Kennington's brief, Merrick is a former associate with Sutherlin's office who worked on Kennington's case in 2002. Indeed, the timeslip records attached to Sutherlin's affidavit indicate that Merrick worked on Kennington's case between June and December 2002 at an hourly rate of $175. To support the claim for a higher rate, Kennington argues:

> Mr. Merrick's hourly market rate is $200. According to the documentary evidence submitted to the Court, Mr. Merrick bills out at a current market rate of $200 per hour for professional services rendered. Currently, Mr. Merrick is employed as an attorney for a state agency. However, he charges–and clients pay–$200 per hour for work he performs outside his public sector duties. It is true that Mr. Merrick's timeslips indicate he billed out at the rate of $175 per hour in 2002. However, Mr. Merrick's current rate, as detailed in the evidentiary materials is $200 per hour.

[Docket No. 105, pp. 4-5]. Several problems exist with this statement. First and foremost, the evidentiary materials do not indicate that Merrick's current hourly rate is $200 per hour. In fact, the only references to Merrick's alleged $200 hour rate in the evidence before the Court is contained in Sutherlin's affidavit and Judge Johnson's fee award in Perkins v. Earles, et al, 49D02-9902-CT-00183. Neither establish Merrick's current market rate. Sutherlin's affidavit does not establish that he has personal knowledge of the current hourly rate of a former associate. Thus, its evidentiary value in establishing Kennington's burden is somewhat shaky. In addition, Judge Johnson, in arriving at Merrick's $200 hourly rate, appears to have solely relied on Sutherlin's affidavit and testimony submitted in the Perkins case. [See Pl.'s Ex. 2, p. 4]. Moreover, a court's fee award in another case, while relevant to this Court's determination, does not establish an attorney's hourly rate in and of itself. See Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 557 (7th Cir. 1999) ("While hourly rates awarded to counsel in similar cases are evidence of an attorney's market rate, 'each court should certainly arrive at its own determination as to a proper fee.'") (citation omitted). Accordingly, such evidence fails to meet

Kennington's burden to substantiate $200 per hour as Merrick's reasonable hourly rate.

Importantly, as the Sheriff points out, none of the supporting affidavits even refer to Merrick or address hourly rates charged by lawyers of similar experience and ability in the community. As noted above,"[a]n attorney's self-serving affidavit alone cannot satisfy the plaintiff's burden of establishing the market rate for that attorney's services." Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 556 (7th Cir. 1999). Accordingly, Sutherlin's affidavit that Merrick's current rate is $200 per hour is unpersuasive. Instead, Kennington has produced competent evidence, though Sutherlin's office's billing records, that Merrick's hourly rate is $175. In addition, the Sheriff has also submitted evidence of Merrick's hourly rate by submitting an affidavit from a previous case. According to Merrick's affidavit, he was admitted to practice in November 1999 and, after a judicial clerkship, entered private practice in August 2001. [Def.'s Ex. E, ¶¶ 2-4]. As of March 1, 2002, Merrick's hourly rate was $175. [Id. at ¶ 5]. Because no persuasive evidence is before the Court to suggest a higher hourly rate, the Court will calculate Merrick's lodestar amount at $175 per hour.

3. Nicholas Conway.

Kennington's request for an hourly rate of $150 for Nicholas Conway shares many of the same problems discussed above with respect to Merrick. For example, Conway has not submitted an affidavit regarding what he charges and receives from hourly clients. Nor do any of the supporting affidavits refer to Conway or hourly rates charged by attorneys of similar experience and ability. As with Merrick, it is Sutherlin who attests to Conway's hourly rate. However, unlike Merrick, Conway remains an associate with Sutherlin's firm. Therefore, Sutherlin has knowledge of Conway's current hourly rate. In addition, the billing records

submitted to the Court reflect an hourly rate of $150 for Conway.[7] The Sheriff counters that Conway was only recently admitted to the Indiana bar in 2003 and that other than his billing record, no other evidence supports Conway's requested hourly rate.

As noted above, the starting point, i.e. the presumptive rate, is the hourly rate an attorney actually charges and is paid by his non-contingency fee clients. Technically, Conway fails to establish what his non-contingency rate is as the billing records submitted to the Court relate to this matter -- a contingency fee case. [See Docket No. 114, p. 4] ("this case, like many other civil rights cases, is on a contingency basis."). However, Conway's billing records do establish a $150 hourly rate, and there is nothing to suggest that he charges a different rate to his hourly clients. Other than to suggest that Conway is a tyro attorney, the Sheriff provides no other evidence (prior fee awards, for example) that would indicate a lower rate than Conway's presumptive hourly rate of $150. On the other hand, Kennington cites to Craig v. Christ, 1999 WL 1059704, at *6 (S.D. Ind. 1999), in which the court awarded a newly admitted attorney $150 per hour in a civil rights case. Accordingly, the Court will calculate Conway's lodestar amount at $150 per hour.[8]

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[7]As noted above, Kennington seeks $3,512.50 for attorneys' fees incurred with respect to his reply brief. In the evidence submitted in support of this fee, Conway's rate inexplicably jumps to $200/hour. [Docket No. 115]. This seems especially odd since both Kennington's fee petition and his reply in opposition to the Sheriff's objections argue for a rate of $150/hour. In any event, the Court calculates Conway's hourly rate at $150.

[8]Nevertheless, it bears noting that Kennington's evidence with respect to Conway's hourly rate is not a model that others should emulate. In Craig, the court arrived at the hourly rate for the newly admitted attorney because the attorney "testified in his affidavit that he bills and receives payment for his services at the rate of $150 per hour, and he has documented that testimony with invoices and checks" and because the evidence established "that other clients have been willing to pay and have paid [the attorney] at that rate." 1999 WL 1059704, at *5. Such evidence does not exist in the instant matter. Kennington provided evidence of what

4. Michael Moore.

As with Merrick and Conway discussed above, Kennington's evidence with respect to Michael Moore's hourly rate is also problematic. Once again, Kennington does not submit an affidavit from Moore that describes Moore's non-contingent hourly rate or otherwise establishes that he charges and is paid $150 per hour by other clients. Likewise, Kennington's supporting affidavits from other attorneys in the community do not establish the hourly market rate for attorneys of comparable experience and ability to Moore. Indeed, nothing before the Court even allows a determination of Moore's experience, ability, and expertise. All that the Court has to go on to establish his reasonable hourly rate are Moore's billing records in this case. Accordingly, Kennington fails to meet his burden of substantiating that $150 per hour is Moore's reasonable hourly rate.

That said, Moore did provide legal services to Kennington and is entitled to a reasonable fee as the prevailing party's attorney under ADA. Accordingly, the Court declines the Sheriff's invitation to completely deny the fees claimed by Moore in this matter. The Sheriff alternatively suggests that "[a]t the very least, Mr. Moore's hourly fee should be reduced by $25.00 to a $125.00 hourly rate." [Docket No. 111, p. 5]. Given Kennington's failure to carry his burden, this is a reasonable result. Accordingly, the Court will calculate Moore's lodestar at $125 per hour.

Conway charged. Kennington did not provide evidence that hourly clients had actually paid Conway at his requested rate. That said, the Sheriff's argument and evidence do not support a lower rate.

5. Law Clerks and Paralegals.

Finally, Kennington seeks $65/hour for time spent on his case by paralegals and law clerks. Once again, Kennington's evidence in this regard falls short. Other than Sutherlin's billing records and his self-serving statement that $65 per hour "is the prevailing market rate in this community for law clerks and paralegals," [Sutherlin Aff., ¶ 11], Kennington provides no evidence of the hourly rate for paralegals in the community. At a minimum, Kennington should have secured and proffered an affidavit from another attorney in the community identifying the hourly rate that attorney charged for work performed by the attorney's paralegals and/or law clerks. Nonetheless, the Sheriff does not challenge this hourly rate, and it seems reasonable. Accordingly, the Court will calculate the lodestar amount for law clerks and paralegals at the hourly rate of $65.[9]

B. Degree of Success.

The Sheriff also argues that Kennington's attorney fee request should be reduced because Kennington did not prevail on all of his claims and/or because Kennington achieved only a nominal or technical recovery. The Sheriff's arguments in this regard are unpersuasive.

With respect to the Sheriff's first argument, the Seventh Circuit Court of Appeals has stated:

> When a plaintiff has obtained an excellent result, his attorney should recover a fully compensable fee (i.e., the modified lodestar amount), and the fee "should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." [Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933 (1983)]. However, "[i]f . . . a

[9]According to Sutherlin's affidavit, his law clerks and paralegals spent 131.83 hours on Kennington's case. [Sutherlin Aff., ¶19]. However, the billing records attached to Sutherlin's reflect that only 128.83 hours were expended. Therefore, the Court calculates the lodestar amount for law clerks and paralegals based on the actual time records.

> plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Id. at 436, 103 S. Ct. 1933. In such a case, the district court has the discretion to reduce the modified lodestar amount to reflect the degree of success obtained. See id. at 436-37, 103 S. Ct. 1933.

Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 557-58 (7th Cir. 1999). According to the Sheriff, Kennington's claims consisted of essentially two parts: (1) that the Sheriff discriminated against Kennington during the book-in process; and (2) that the Sheriff discriminated against Kennington while incarcerated in the Lock-up. Therefore, the Sheriff argues, because Kennington succeeded only on the second issue, Kennington obtained limited success and the fee award should be reduced accordingly. The Court disagrees.

As Kennington points out, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." Hensley, 461 U.S. at 435. Even as articulated by the Sheriff, Kennington's claims are sufficiently related so that it would be impossible to separate Kennington's attorneys' work between the claims. Moreover, Kennington's claims against the Sheriff are not separate and distinct. As framed in the order on summary judgment, Kennington "contends that the Sheriff discriminated against him in violation of Title II of the ADA by failing to accommodate his disability while he was in the Lock-up. More specifically [Kennington] alleges that the Sheriff deliberately violated the ADA by failing to provide him with a TTY, an interpreter or other reasonable accommodation, despite an awareness that he was disabled and required such accommodations." [Docket No. 88, p. 6]. That the Sheriff violated Kennington's rights while Kennington was in Lock-up as opposed to book-in is not cause to "separate" Kennington's claims for fee purposes. The fact remains that Court found that the Sheriff

violated Kennington's rights under the ADA while Kennington was in the Sheriff's custody. Finally, as noted by Judge Tinder, Kennington proceeded under both "failure to accommodate" and intentional discrimination theories. Kennington prevailed on both. In short, the Sheriff's "limited success" argument fails.

The Sheriff's second argument in this regard is equally unconvincing. According to the Sheriff, because Kennington ultimately settled his claims for $5,000, Kennington achieved a de minimis result. Therefore, the Sheriff argues that the Court should reduce Kennington's fees pursuant to the analysis first introduced in Justice O'Conner's concurring opinion in Farrar v. Hobby, 506 U.S. 103, 121-22 (1992), and endorsed by the Seventh Circuit Court of Appeals. See Simpson v. Sheahan, 104 F.3d 998, 1001 (7th Cir. 1997) ("In cases which result in a nominal damage award that is minimal in relation to the amount of damages sought, this circuit employs the three-part test from Justice O'Conner's concurrence in Farrar to determine whether a prevailing party achieved enough success in the underlying suit to be entitled to an award of attorney's fees."). Under Farrar, the Court looks at the following factors to determine the degree of Kennington's success: (1) the difference between the judgment recovered and the judgment sought; (2) the significance of the legal issue on which Kennington prevailed; and (3) the public purpose of the litigation. Simpson, 104 F.3d at 1001. "The first factor bears the most weight, whereas the second factor bears the least." Id.

With respect to the first factor, the Sheriff points to Kennington's last settlement demand of $75,000, arguing that Kennington's ultimate relief of $5,000 "fell far short of his original goal." [Docket No. 111, p. 8]. However, the Sheriff's argument takes Kennington's demand -- and the ultimate settlement -- out of context. As Kennington points out in reply, his final

settlement demand included any claim for attorneys' fees. [Docket No. 114, p. 8, citing Def.'s Ex. B]. In contrast, the ultimate settlement explicitly contemplated an award of fees in addition to the $5,000. [See Def.'s Ex. A, ¶ 3] ("The parties also agree that Defendant will be liable to Plaintiff for attorney's fees in an amount to be determined by the Court."). Taken together, i.e. $5,000 plus attorneys' fees, Kennington did not fall "far short" of his goal. This factor favors Kennington.

The parties do not really address the other two factors, though the Court will do so briefly. The second factor strongly favors Kennington. Issues regarding disability discrimination by a public entity -- particularly one such as the Sheriff who has the authority to confine individuals subject to certain constitutional limitations -- are undoubtedly significant. The third factor is a closer call. As just stated, disability discrimination by a public entity is an important public concern. However, the settlement Kennington achieved appears to directly remedy only his personal situation (i.e., money damages), though perhaps the sting of this litigation indirectly prompted increased ADA awareness by the Sheriff. Cf. Aynes v. Space Guard Products, Inc., 201 F.R.D. 445, 452 (S.D. Ind. 2001) (finding that the third Farrar factor "clearly cuts both ways" because, while sexual harassment at work is an important societal concern, plaintiff brought suit for personal, rather than public reasons). In short, this is not a case where "the plaintiff was aiming high and fell far short." Hyde v. Small, 123 F.3d 583, 585 (7th Cir. 1997). Rather, "the case was simply a small claim and was tried accordingly." Id.

C. Fees and Costs Chargeable to the Lawrence Defendants.

The parties agree that Kennington's fees and costs related solely to his claims against the Lawrence Defendants are not chargeable to the Sheriff. According to Kennington, "[c]ounsel for

Plaintiff has cut form the total fee request the time and expenses that he spent exclusively on prosecuting his claims against the Defendant City of Lawrence police officers." [Docket No. 105, p. 7]. Not surprisingly, however, the Sheriff disagrees and challenges several items included in Kennington's fee petition.

With respect to Kennington's requested costs, the Sheriff challenges the following items: (1) $8.84 in certified mail costs for the depositions of Lawrence officers David Carter and Mike Davis; (2) $100 for investigation services; (3) $931.14 for the depositions of officers Carter and Davis; (4) $562.50 for expert interpreting services for the depositions of officers Carter and Davis; and (5) $91.35 for a transcript relating to the depositions of Carter and Davis. Each is addressed below.

Kennington responds to the Sheriff's objection to the certified mail costs by explaining that the "notices were sent certified mail because there had been some communication problems in the past and there was a concern on the part of Plaintiff's counsel to make sure that the defendants' attorneys were notified of the depositions." [Docket No. 114, p. 9]. A review of the certified mail receipts indicates that the notices were sent by certified mail to counsel for the Lawrence Defendants, rather than counsel for the Sheriff. [Docket No. 114, Ex. B]. It is reasonable to conclude that the "communication problems" to which Kennington refers occurred between the Lawrence Defendants and Kennington. Accordingly, the Sheriff should not be liable for those fees. While exceedingly minimal, fairness nonetheless dictates that $8.84 be deducted from Kennington's requested costs.

Likewise, the amount claimed for investigation services is also not chargeable to the Sheriff. According to Kennington, the investigation services "were a part of finding and picking

up Mr. Kennington for his depositions." [Docket No. 114, p. 9]. The cost incurred as a result of Kennington's counsel's inability to keep track of his client is not properly transferred to the Sheriff. Therefore, $100 will be deducted from Kennington's requested costs.

The remaining disputed costs all relate to the deposition of officers Carter and Davis. Kennington argues that the depositions of Carter and Davis were relevant to both his claims against the Lawrence Defendants and the Sheriff. Specifically, Kennington argues that "[i]t was critical to Mr. Kennington's case to find out whether there was an appropriate exchange of information from the arresting officers to the agents of Marion County Sheriff to see if there was notice, and if so when it occurred of Mr. Kennington's disability." [Docket No. 114, p. 10]. The Court disagrees. A review of the Court's Entry on Cross-Motions for Summary Judgment reveals that the testimony of Carter and Davis was not critical to Kennington's claims against the Sheriff. Indeed, neither Carter nor Davis is even mentioned in the Court's decision granting summary judgment in Kennington's favor -- which is not surprising since neither party submitted any excerpts of these depositions in the summary judgment briefing. Accordingly, the depositions of Carter and Davis related solely to Kennington's claims against the Lawrence Defendants. As a result, $1584.99 will be deducted Kennington's requested costs.

The Sheriff also disputes certain attorney time billed by Michael Moore on the basis that Moore's time records indicate that he was working on responding to interrogatories and requests for production from both the Lawrence Defendants and the Sheriff. This is not a particularly compelling argument. Discovery requests in these types of matters typically request a great deal of background information from a plaintiff. Thus, responding to one set of discovery requests, in all likelihood, assisted in responding to the other. The Sheriff should compensate Kennington

for Moore's time in this regard.

Finally, the Sheriff argues that Kennington's attorneys' fees relating to his response to the Court's order to show cause [Docket No. 18] should not be allowed because it related to "unnamed" Lawrence officers. However, as the Court's entry on the order to show cause makes clear, the show cause order related to unnamed Marion County officers. [See Docket No. 23]. As the Sheriff makes no other argument as to why these fees should be disallowed, Kennington is entitled to attorneys' fees in this regard.

D. Compensable Hours.

The Sheriff also takes issue with Kennington's request for attorneys' fees and related costs associated with Kennington's failure to appear at his own properly noticed deposition. The Court agrees that the Sheriff should not be required to foot the bill for Kennington's failure to appear. Accordingly, all costs and fees associated with Kennington's failure to appear at his May 23, 2003 deposition will be disallowed. This included 3.1 hours of Sutherlin's time, 1 hour of Moore's time, and $360 in costs relating to an expert interpreting fee from Deaf Community Services.[10]

E. Excessive Hours.

Next, the Sheriff argues that the time spent on certain tasks, "either because of billing by multiple attorneys or simply spending too much time given an issue's complexity, is excessive." [Docket No. 111, p. 12]. Specifically, the Sheriff takes issue with Kennington's counsel's .2 hours minimum billing practice, arguing that such time is excessive when "reviewing" routine

[10]Sutherlin's billing records reflect a separate entry for deposition preparation, which has not been contested and which is recoverable. [Sutherlin Aff., Attach. 1].

court orders and motions. Kennington responds that such practice is reasonable because: "Plaintiff's counsel must ensure that each letter or pleading or document is properly calendared and indexed in a pleadings or correspondence file. Furthermore, these cross checks and redundancies are essential in order not to miss a deadline and to track the orders and deadlines of the Court." [Docket No. 114, p. 13]. While the practice of minimum billable time is subject to abuse, the Court has reviewed the contested entries and finds the time spent on such matters is reasonable based on the record before the Court. In addition, the Court has reviewed the additional entries challenged by the Sheriff, namely those relating to the Case Management Plan and initial pretrial conference, and finds that they are also reasonable under the circumstances.

F. Specificity.

Finally, the Sheriff challenges a number entries claiming that they "lack sufficient specificity on various dates to permit the Court to conduct the sort of detailed review necessary to award fees. The Court disagrees. Placed in context, a review of the challenged entries allows the Court to reasonably determine the subject matter on which Kennington's attorneys worked. As noted in Craig v. Christ:

> The City challenges numerous entries for "conferences," "interviews," "meetings," and so forth as not specific enough to be compensable. In fact, the actual time entries themselves are more specific than the City argues. Especially when read in context, with an eye on the calendar and the docket, the records provide a sufficient indication of the subject matter. The record-keeping requirements under § 1988 are not intended to become oppressive burdens. "Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." [Hensley v. Eckerhart, 461 U.S. 424, 437 n.12 (1983)]. In addition, experienced counsel know that they cannot guarantee the confidentiality of billing records and prepare their time entries in light of the risk that the records might be disclosed to opponents at a time when a detailed entry would provide tactical intelligence. The court will not disallow time on this basis.

1999 WL 1059704, at *17 (S.D. Ind. 1999). Recognizing the practicalities and realities of

billable time, the Court finds that, under the circumstances here, the Sheriff's argument about the specificity of the time records is unavailing.

IV. Conclusion.

Based on the above discussion, the Magistrate Judge recommends that Plaintiff's petition for attorneys' fees be granted in part and denied in part. To that end, the Magistrate Judge recommends that: (1) Kennington's motion be denied to the extent it seeks $61,949.45 in fees and $4,565.39 in costs; and (2) Kennington's motion be granted to the extent it seeks $51,201.95 in attorneys' fees and $2,511.56 in costs.

Any objections to the Magistrate Judge's Report and Recommendation shall be filed with the Clerk in accordance with 28 U.S.C. § 636(b)(1), and failure to file timely objections within the ten days after service shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

SO ORDERED this ___ day of March, 2005.

Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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